C.P. Associates, Inc. *and* International Union of Bricklayers & Allied Craftsmen, AFL–CIO, Local 1. Case 34–CA–8123

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On July 23, 1998, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

1. The judge dismissed complaint allegations that on November 12, 1997, the Respondent coercively interrogated Theodore Mayo, threatened him with job loss, and terminated him because of his union membership and activities.[3] The General Counsel has filed exceptions to these findings. For the reasons set forth below, we find merit in these exceptions.

The judge relied on his conclusion that Mayo's dates of employment with the Respondent were November 3 and 4, predating any organizational activity or the Respondent's knowledge of any organizational activity at the jobsite.[4] The Respondent, however, in its answer to both the complaint and amended complaint, admitted that it terminated Mayo on "about November 12." Contrary to the judge, we find that the Respondent's admission that it terminated Mayo on November 12 is binding.

As the Board recently reiterated, an admission is in effect a confessory pleading, and it is conclusive upon the party making it. *Boydston Electric, Inc.*, 331 NLRB 1450 (2000) (quoting *Academy of Art College*, 241 NLRB 454, 455 (1979), enfd. 620 F.2d 720 (9th Cir. 1980)). The administrative law judges, the Board, and the parties rely on the complaints and the answers to determine contested issues. Id. Nor do we find that the introduction of potentially conflicting evidence negates the binding effect of the admission. Both the Board and the courts have held that admissions contained in pleadings are binding even where the admitting party later produces contrary evidence. Id. Accordingly, we find that the Respondent is bound by its admission that it terminated Mayo on about November 12.

Having found that Mayo was discharged by the Respondent on November 12, we further find that the General Counsel has met his burden of establishing that protected activity was a motivating factor in the Respondent's decision to discharge Mayo. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Respondent had knowledge of Mayo's union membership based on the Respondent's unlawful interrogation of Mayo when he applied for work. The Respondent's animus is established by its unlawful threats and discharge of Palmeri as well as Mayo's uncontradicted testimony that on November 12 the Respondent interrogated Mayo and threat-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that Supervisor Jack Caira's threat to Timothy Palmeri violated Sec. 8(a)(1), we disavow the judge's suggestion that Palmeri, as a professional union organizer, was not likely to be as intimidated by such a threat as a rank-and-file employee. The judge acknowledged that the Board does not apply a different standard for evaluating alleged coercive conduct directed at employees who are also professional union organizers. The test to determine whether a statement is unlawful under Sec. 8(a)(1) is an objective one, not dependent on whether the coercion succeeds or fails. *Joy Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.,* 320 NLRB 71 fn. 4 (1995), enfd. in relevant part sub nom. *Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284 (6th Cir. 1997). See *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001) (prounion sympathies of the threatened employees do not negate or even mitigate the statement's coerciveness).

[3] We agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act by questioning Mayo about his union membership when he applied for a job.

[4] The judge based this conclusion merely on handwritten payroll records that indicated that the Respondent employed Mayo on November 3 and 4, 1997. The reliability of these forms is suspect. The Respondent's president, Kevin Caira, admitted that he often filled out the payroll certification forms weeks or even months after the work was done. Also, the dates on the forms often do not correspond to the proper day of the week, i.e., October 26 is recorded as a Monday, when it actually fell on a Sunday. With regard to the deficiency report, as the judge observed, the date appears to have been altered from November 4 to 11. The judge concluded that the earlier date was consistent with the credible testimony of Supervisor Brian Quinlan as to problems with the Dur-o-Wall, a wall reinforcing mesh, identified by the architect's field representative on Mayo's second day. Quinlan, however, never testified as to the actual date of Mayo's second day on the job. The architect's representative, Beaureguard, testified that he was on the site on November 7, 10, 11, and 12, and identified Dur-o-Wall problems on November 11 and 12. Although Beauregard acknowledged that someone else performed site inspections before him, there is no conclusive record evidence to support the judge's inference that the earlier date is accurate. In contrast, the later date is supported by the Respondent's admissions.

ened him with discharge for engaging in union activity.[5] Shortly thereafter, Mayo was discharged.

We further find that the Respondent failed to meet its burden of establishing that it would have discharged Mayo even absent Mayo's union activity. We reject the judge's alternate conclusion, based on Jack Caira's testimony that Mayo quit in response to Caira's "pushing" him to put out more work. Although the judge cited Jack Caira's testimony that Mayo quit after Caira told Mayo to work faster, we find that the testimony does not establish a legitimate defense because the Respondent admitted that it fired Mayo. Accordingly, we find that the Respondent's discharge of Mayo violated Section 8(a)(3) and (1) of the Act.

2. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Todd Dexter and Judith Livesey on November 18 because of their union membership. Although the judge decided this case before the Board issued its decision in *FES,* 331 NLRB 9 (2000), and applied slightly different standards in assessing the General Counsel's case, we nevertheless find that the General Counsel has met his burden of proof under the *FES* standards.

In *FES*, supra, the Board restated the elements that the General Counsel must establish to meet his burden of proof in a discriminatory refusal-to-hire case as follows:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision to hire the applicants.

We find that the General Counsel has successfully established each element of the *FES* standards for a refusal-to-hire violation. With respect to element (1), the judge found that the Respondent was running advertisements for bricklayers in local newspapers and in newspapers as far away as Montreal. The payroll records show that three bricklayers started working at the jobsite between November 19 and 24. Further, the credited testimony shows that Jack Caira, who had previously exercised his authority to hire employees, had interviewed both Dexter and Livesey on the morning of November 18 and had communicated to them that they were to start that day at 7:30 a.m. With regard to element (2), Caira's interview with Dexter and Livesey revealed that they were both union bricklayers and included an understanding as to what would be an acceptable level of expected production. This discussion, as well as Caira's communication of when the employees were to start that day, demonstrates that Caira had made a determination that these applicants had the relevant training and experience for the bricklayer positions. With respect to element (3), the judge found and we agree, as discussed above, that approximately 6 days earlier the Respondent had unlawfully interrogated employees Palmeri and Mayo, threatened them with discharge, and discharged them because of their union activity. Jack Caira asked both Dexter and Livesey in their job interviews if they were "Union," and told them he had "just got rid of your union buddies for poor performance." When Dexter reported to work, Caira then told him that "I just got off the phone with my boss and he's been getting a lot of letters and stuff and with you being Union, I can't put you on." Caira told Livesey that he wouldn't be able to hire her and that it wouldn't be worth it. These credited statements[6] by Jack Caira provide ample evidence that union animus contributed to the decision to deny Dexter and Livesey employment. Thus, we are satisfied that the parties litigated, and the General Counsel successfully established, each element of the prima facie case of a discriminatory refusal to hire under *FES*.

Under *FES*, once the General Counsel has met his initial burden of proof, the burden shifts to the respondent to show that it would not have hired the alleged discriminatees even in the absence of their union activities or affiliation. Id. at 12; *Wright Line*, above. We agree with the judge that the Respondent failed to meet this burden. The Respondent has characterized Jack Caira's actions on November 18, as merely a recommendation that Dexter and Livesey be hired, which the Respondent's owner, Kevin Caira, refused to approve prior to the start of the work that day. The basis for this reversal of the hiring decision has not been affirmatively shown to be grounded on nondiscriminatory reasons. On the contrary, the Respondent in its brief, is merely able to speculate that it is "entirely likely" that Dexter and Livesey were not hired because other bricklayers were scheduled to arrive at the worksite in the next several days. Such

[5] The judge's only basis for dismissing the complaint allegations that these actions violated Sec. 8(a)(1) of the Act was his conclusion that Mayo was discharged on November 4. Since we find that Mayo was discharged on November 12, we find merit in the General Counsel's exceptions and find that the Respondent unlawfully interrogated Mayo and threatened him with discharge on November 12, as alleged.

[6] We agree with the judge that Jack Caira's questioning of Dexter and Livesey regarding their union membership was coercive and violated Sec. 8(a)(1) of the Act.

speculation does not fulfill the Respondent's affirmative obligation to show that the hiring decision would have been the same in the absence of the unlawful motive. Indeed, the only definitive evidence in the record is the credited testimony that Jack Caira implicated the Union in announcing that the reversal of the hiring decision by stating to Dexter, "Sorry, I can't put you on. I just got off the phone with my boss and he's been getting a lot of letters and stuff and with you being Union, I can't put you on." His statement to Livesey that "he wouldn't be able to hire her, that it wouldn't be worth it," similarly provides no legitimization for the reversal of the hiring decision. This testimony merely serves to corroborate the unlawful motive. Accordingly, we conclude, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Todd Dexter and Judith Livesey.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, C.P. Associates, Inc., Storrs, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union membership and activities and threatening employees with job loss for engaging in union and other protected concerted activities.

(b) Discharging, refusing to hire, or otherwise discriminating against any employee for supporting the International Union of Bricklayers & Allied Craftsmen, AFL–CIO, Local 1, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Timothy Palmeri and Theodore Mayo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Timothy Palmeri and Theodore Mayo for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, in the manner described in the remedy section of the decision.

(c) Within 14 days from the date of this Order, offer Todd Dexter and Judith Livesey instatement in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights and privileges they would have enjoyed absent the discrimination against them.

(d) Make whole Todd Dexter and Judith Livesey for any loss of earnings and other benefits they may have suffered as a result of the unlawful refusal to hire them in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files the following: any reference to the unlawful discharges of Palmeri and Mayo; and any reference to the unlawful refusal to hire Dexter and Livesey; and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Everett, Massachusetts, and at its jobsite in Storrs, Connecticut, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendancy of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union membership and union activities.

WE WILL NOT threaten you with job loss for engaging in union and other protected concerted activities.

WE WILL NOT discharge, refuse to hire, or otherwise discriminate against any of you for supporting the International Union of Bricklayers & Allied Craftsmen, AFL–CIO, Local 1, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Timothy Palmeri and Theodore Mayo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Timothy Palmeri and Theodore Mayo for any loss of earnings and other benefits that they may have suffered as a result of their unlawful terminations, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Todd Dexter and Judith Livesey in the positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired.

WE WILL make whole Todd Dexter and Judith Livesey for any loss of earnings and other benefits that they may have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files to the following: any reference to the unlawful terminations of Timothy Palmeri and Theodore Mayo; and any reference to the unlawful refusal to hire Todd Dexter and Judith Livesey, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful conduct will not be used against them in anyway.

C.P. ASSOCIATES, INC.

Terri A. Craig, Esq., for the Acting General Counsel.
James W. Savage, Esq., for the Respondent.
Thomas M. Brockett, Esq. and *John T. Fussell, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on April 14 and 15, 1998. The charge was filed by International Union of Bricklayers & Allied Craftsmen, AFL–CIO, Local 1, the Union, on November 20, 1997,[1] and amended on January 5, 1998. The complaint issued February 12, 1998. The complaint, as amended at the hearing, alleges that the Respondent, C.P. Associates, Inc., violated Section 8(a)(1) of the Act through threats and interrogations and violated Section 8(a)(1) and (3) of the Act by terminating employees Timothy Palmeri and Theodore Mayo and refusing to hire Todd Dexter and Judith Livesey because of their membership in and activities on behalf of the Union. The Respondent filed its answer to the complaint on March 11, 1998, and amended it at the hearing, denying that it committed any unfair labor practices and asserting a variety of affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that it is a corporation with a principal office and place of business in Everett, Massachusetts, and a jobsite at the University of Connecticut in Storrs, Connecticut, where it provides masonry services in the building and construction industry. The Respondent further admits that, during the 12-month period ending January 31, 1998, it performed services valued in excess of $50,000 in States other than the State of Massachusetts. Based on these admitted facts, I find that the Respondent is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the testimony of Palmeri, the Union's recording secretary and field representative, I find that the Union is an organization in which employees participate and which exists for the purpose of dealing with employers concerning, inter alia, grievances, wages, rates of pay and other working condi-

[1] All dates are in 1997 unless otherwise indicated.

tions. As such, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent, as a subcontractor to Suffolk Construction, was hired to perform masonry work on a dormitory construction project at the Storrs campus of the University of Connecticut (UConn).[2] Payroll records and testimony show that approximately 15 bricklayers and 15 laborers were employed by the Respondent on this site during November. Kevin Caira is the Respondent's president and owner and was not present at the site on a daily basis. Kevin Caira testified that he tried to visit sites such as the UConn job, which were distant from the Respondent's office, once or twice a week. According to Kevin Caira, the Respondent had two foremen on this job, Cesar Coelho and Brian Quinlan, who "supervised" the employees at the site. Kevin Caira's brother, Jack Caira, was also employed by the Respondent at the Storrs jobsite. Although the Respondent admitted in its answer that Jack Caira was a foreman, at the hearing Kevin Caira testified that his brother was a "pusher," not a foreman. Jack's responsibilities involved getting the laborers going in the morning and "pushing" the bricklayers to meet production quotas. Jack Caira was neither an owner nor officer of the Respondent. The Respondent has denied that the Caira brothers and Coelho were its supervisors and/or agents.

Palmeri testified that he was hired to work for the Respondent at the UConn job by Jack Caira. According to Palmeri, when he visited the job on Thursday, October 23, looking for work as a bricklayer, the superintendent for Suffolk directed him to Jack Caira. When Palmeri told Jack that he was looking for work as a bricklayer, Jack asked for whom had Palmeri worked before. In response, Palmeri identified several union mason contractors as his former employers. Jack then said, "those contractors are union" and asked Palmeri if he was in the Union. When Palmeri replied affirmatively, Jack told him that the Respondent was nonunion and asked Palmeri what his business agent would say about him working on a nonunion job. Palmeri responded that he just wanted to work. Jack repeated that the Respondent was nonunion and said "we don't want trouble." When Palmeri repeated that he just wanted to work, Jack told him to show up on Monday. According to Palmeri, Jack said this without leaving to consult with anyone.

Jack Caira did not specifically deny this conversation but generally denied that he had the authority to hire employees. According to Jack Caira, when Palmeri showed up on the job, he put him to work because his brother Kevin told him the night before that he had hired three guys who would be showing up on the job the next morning. According to Jack Caira, he believed that Palmeri was one of these three. Jack Caira conceded that no other new employees showed up at the jobsite that day. Kevin Caira did not corroborate Jack regarding the circumstances of Palmeri's hiring. Coelho, Respondent's foreman on the job, gave a third version of Palmeri's hiring. According to Coelho, he and Jack Caira both hired Palmeri, although Coelho conceded that Palmeri spoke to Jack Caira first. Based on these inconsistencies in the testimony of the Respondent's witnesses, I find that Jack Caira hired Palmeri.

Palmeri testified that he started work the following Tuesday, October 28, because work was canceled on Monday due to rain. The Respondent's certified payroll for the week ending November 1 shows that Palmeri was paid for 8 hours on that Monday. According to Palmeri, Coelho was his immediate supervisor on the job, laying out the work, organizing his next move, and giving him directions. Palmeri testified that Jack Caira also sometimes told him where to work. Palmeri testified that on one occasion, he asked Coelho for time off to attend a court proceeding related to his divorce and that Coelho approved this request on the spot. Certified payroll records in evidence suggest that this occurred during Palmeri's first week on the job. Coelho did not contradict this testimony.

Kevin Caira and Coelho testified, consistently with Palmeri, that Coelho, as the foremen, was responsible for laying out the work and assigning employees to specific tasks. They also testified that Coelho was responsible for checking the employees work to make sure they were following the specifications for the job and meeting the Respondent's production standards. The foremen also prepared timesheets used by the Respondent to prepare the payroll. Although Kevin Caira testified that only he had the authority to hire and fire, he admitted that Coelho could put someone to work if he needed workers and someone came to the job and "looked like they knew what they're doing." Kevin Caira testified that he will then visit the job and observe for himself how the new employee is doing, but he admitted consulting with Coelho and his brother Jack before determining whether to retain or terminate a new employee. Kevin Caira further testified that the foremen, like Coelho, were responsible for enforcing the Respondent's unwritten work rules and could give verbal warnings to employees. Coelho testified that he "used to hire people" and, as noted above, was involved in hiring Palmeri. Mayo testified, without contradiction, that he was hired on the spot by Coelho. Coelho testified further that he had the authority to fire someone if he didn't see any production for 2–3 days but that he would usually call Kevin.

I find that the evidence in the record is sufficient to establish the supervisory/agency status of the Caira brothers and Coelho. It can hardly be disputed that Kevin Caira, as the Respondent's owner and president with the admitted authority to hire and fire, meets the statutory definition of a supervisor. Based on my finding above that Jack Caira hired Palmeri and the testimony of the Respondent's witnesses regarding Jack's authority to "push" the employees to get the work out, he clearly was a statutory supervisor. Because it is undisputed that Coelho, the foreman on the job, could put people to work, tell them what to do, and let them go if they were not meeting the Respondent's expectations, he also meets the statutory definition of a supervisor. I note further that, were I to agree with the Respondent that Coelho and Jack Caira were not supervisors, there would be no one in charge at the jobsite to supervise the work of as many as 45 employees. See *Essbar Equipment Co*., 315 NLRB 461 (1994). Finally, I note that, even under the Respondent's

[2] This jobsite is incorrectly referred to throughout the transcript as the "Yukon jobsite." I hereby correct the record to change "Yukon" to "UConn" wherever it appears in the transcript.

limited view of the authority possessed by Jack Caira and Coelho, they would meet the Board's definition of an agent of the Respondent because they were held out to the employees as the Respondent's representatives on the job who could assign them work, check their production, and verbally reprimand them if they did not meet the Respondent's expectations. See *GM Electrics*, 323 NLRB 125 (1997), and cases cited therein.

On November 5, during Palmeri's second week on the job, a wall, which Palmeri had constructed blew out. According to Palmeri, he used the proper block, which he called a knockout block, but the grout crew poured the grout before the wall had time to set, causing the blowout. Although Coelho blamed Palmeri for the blowout, testifying that the knockout block Palmeri admitted using was not the proper block, he acknowledged that it takes a couple hours for a wall to set before it can be grouted.[3] It also appears from his testimony that he did not personally observe what caused the blowout. Jack Caira testified that a laborer on the grout crew told him that somebody put "soap" in the wall and the wall blew out. When Jack Caira asked who worked on the wall, the laborer told him it was Palmeri. There is no dispute that Jack Caira then confronted Palmeri and loudly told him to fix the wall and that Palmeri walked off the job without fixing it. According to Palmeri, he told Coelho that he was quitting because he didn't like being treated like an animal, referring to the way Jack Caira had screamed at him. It is also undisputed that about an hour after the wall blew out, Coelho talked to Palmeri in the parking lot and asked him to come back to work and that Palmeri returned to work that same day.

Palmeri testified that on November 11, before work, he gave Coelho a copy of a letter dated November 10 from the Union to the Respondent, informing the Respondent that the Union was organizing its employees on the UConn job and that Palmeri had been designated the principal organizer. According to Palmeri, Coelho asked him what the letter meant. When Palmeri told Coelho that he was there to organize the Respondent, Coelho said, "you've got to be kidding." Coelho admitted being given this letter by Palmeri but denied reading it. According to Coelho, when he saw the Union's letterhead, he immediately gave it to Jack Caira. Jack Caira was not asked about the letter. Kevin Caira denied seeing this letter before the hearing, but admitted being made aware of it. Kevin Caira testified that he believed that he learned of the letter after Palmeri's termination. I find this testimony incredible in light of Coelho's admission that he gave it to Jack Caira, Jack's failure to testify and Kevin Caira's subsequent actions, which also establish that he knew about the letter on November 11.

Palmeri testified further that Jack Caira approached him at about 8:30 a.m. that day and asked Palmeri who gave him the letter. When Palmeri told him he got it from the business manager of the Union, Jack Caira asked if the business manager told Palmeri to get off the job. Palmeri replied that, on the contrary, he was told to stay on the job and organize the employees into the Union. This conversation then ended. At about 10 a.m., according to Palmeri, Jack Caira called Palmeri over and asked him what the letter meant. When Palmeri replied that it was notification from the Union that it was organizing the Respondent's employees, Jack Caira raised his voice and gestured with his arms and hands, saying that he was going to settle things then and there by having a meeting with all the employees so that Palmeri could talk to them. Palmeri declined this opportunity, suggesting they wait until lunchtime rather than stopping work at that moment. According to Palmeri, Jack Caira then said that anybody talking union to his people would be grounds for immediate termination. Palmeri responded that was why he was there and that was what he was going to do and then returned to work. Palmeri testified that Jack Caira also said during this conversation that he would put union people to work but would not sign a union contract. According to Palmeri, he was told later that morning that the lunch meeting with the employees was canceled because Kevin Caira was coming to the jobsite the next day to talk to Palmeri. Jack Caira was not asked about these conversations with Palmeri. Coelho, on cross-examination, recalled something about Palmeri wanting to have a meeting on the day he gave Coelho the letter. Coelho recalled further that he relayed this to Jack and that Jack came back later and said that his brother was coming to the job the next day and would talk to Palmeri then and that he relayed this to Palmeri.

The General Counsel alleges that the Respondent, through Jack Caira, violated Section 8(a)(1) of the Act during the November 11 conversation with Palmeri by threatening employees with job loss for engaging in union and other protected concerted activities. Because Jack Caira was not asked about this conversation, Palmeri's testimony is undisputed. Jack Caira's statement that anyone talking union to his people would be grounds for immediate termination is a classic threat within the meaning of Section 8(a)(1) of the Act. *Omsco, Inc.,* 273 NLRB 872 fn. 2 (1984). This alleged threat, however, was made in the same conversation in which Jack Caira invited Palmeri to talk to the employees about the union at a meeting and told Palmeri that he would hire union members but would not sign a union contract. These apparently contradictory statements tend to make the threat somewhat ambiguous. However, in the absence of any testimony from Jack Caira that would deny, explain, or clarify the statements made in his conversation with Palmeri, I am constrained to find the threat coercive. I note, further, that Palmeri, as a professional union organizer was not likely to be as intimidated by such a threat as a rank-and-file employee, and in fact demonstrated this by telling Jack Caira in the same conversation that he intended to pursue his organizing activity notwithstanding this threat. Nevertheless, the Supreme Court has held that professional union organizers like Palmeri are employees within the meaning of the Act and entitled to the Act's protection. *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995). Because the Board has not yet adopted a different standard for evaluating alleged coercive conduct directed at such professional organizers who become employees, I must apply the Board's traditional objective test, i.e., whether Jack Caira's statement reasonably tended to interfere with employees' Section 7 rights. Applying that test here, I find that Jack

[3] I note that before Palmeri testified that he had used a knockout block the Respondent had argued that Palmeri "soaped a block," i.e., cutting a block so that only the face of the block was used, which would be structurally weaker.

Caira's threat of job loss violated Section 8(a)(1) of the Act as alleged in the complaint.

According to Palmeri, the next day, November 12, as he was arriving for work he encountered the Caira brothers coming out of the office trailer. Kevin Caira called Palmeri over, handed him an envelope containing his paycheck, and told Palmeri that his services were no longer needed. Palmeri testified that he was given no reason for the termination at that time. When he returned later and asked for a pink slip for unemployment, Kevin Caira gave him one indicating that the reason for termination was "job performance not to standard." On direct examination, Palmeri testified that he had no prior warning or indication that his job was in jeopardy or that his performance was lacking. On cross-examination, he recalled the November 5 incident described above, in which he quit after being screamed at by Jack Caira over the blown out wall, and further recalled being given "guidance" a couple times during his first 2 days on the job regarding how the Respondent wanted the Dur-o-wall, a reinforcing mesh, overlapped. Palmeri also admitted, on cross-examination, that the day before he was fired he did not use the proper prefabricated Dur-o-wall in a corner wall he was building because none was available. According to Palmeri, an inspector for the architect caught him and made him fix it, which he estimated took him 3 minutes to do. Palmeri testified that Coelho later said to him, "you forgot the Dur-o-wall," that Palmeri told Coelho that he had already fixed it and that nothing more was said.

There is no dispute that Kevin Caira made the decision to terminate Palmeri on November 11. According to Kevin Caira, he made this decision after receiving a verbal report from Bob DiDonato, the superintendent for the general contractor, that day indicating that State inspectors found that some of the Respondent's masons were not installing Dur-o-wall with the proper splice. According to Kevin Caira, this refers to the building specification for a 6" overlap of adjoining pieces of Dur-o-wall. The general contractor's representative did not identify the bricklayer or mason involved, but Kevin Caira testified that he learned from Coelho or his brother that it was Palmeri. According to Kevin Caira, because Palmeri already had the incident with the blown out wall, he found this reported conduct unacceptable and decided to terminate Palmeri. He then had Palmeri's final check made out and went to the job the following day, November 12, to terminate him. Respondent also put in evidence a document from Suffolk Construction, the general contractor, labeled "Avoid Verbal Orders," which Kevin Caira described as a deficiency report relating to the incident for which Palmeri was fired. Kevin Caira testified that this report was handed to him, along with another similar report to be discussed infra, by DiDonato a couple days after the incident. The date on the report appears to have been altered from "11 November" to "4 November," but Kevin Caira testified that is the form in which it was received. This document advises the Respondent that a State inspector found that "at Bldg. B at the northwest corner CMU [concrete masonry unit] walls were being built and the durowall was placed without the specified splice" and directs the Respondent to correct this deficient area immediately at its own expense. Kevin Caira testified that the two deficiency reports he received on the same day were the first he had ever received during his time in business.

On cross-examination, Kevin Caira expanded on this simple explanation to the point that it became incredible. He testified that DiDonato told him the inspector was going crazy over the improper splicing of the Dur-o-wall. Kevin Caira then testified that he confirmed this report in separate conversations with Coelho, Jack Caira, and the other foreman, Brian Quinlan. According to Kevin, his brother and the two foremen told him that night that the inspector found that Palmeri hadn't put wire in his corner and then made everybody stop working for 5 or 6 minutes so they could check and make sure every one was putting the Dur-o-wall in properly. None of the Respondent's other witnesses corroborated Kevin Caira regarding these reports they purportedly gave him on November 11. On the contrary, Quinlan merely testified that, in his limited observations of Palmeri's work, he found him to be slow. Quinlan admitted that he did not notice too much what Palmeri was doing. Moreover, Quinlan was working on building A on November 11 and would not have known what the inspector found or did on building B. Jack Caira testified only about Palmeri's involvement with the blown out wall and, on cross-examination, testified that Palmeri quit. When confronted with a letter from the Respondent's attorney stating that Palmeri had been terminated, Jack Caira responded that he knew nothing about this, "that was Cesar [Coelho] and Brian [Quinlan]'s part of the job." Only Coelho testified about the inspector finding that Palmeri had not used the proper Dur-o-wall on November 11. According to Coelho, when he asked Palmeri about it, Palmeri told him that he didn't have the proper Dur-o-wall. Rather than emphasizing this omission as a basis for Palmeri's termination, Coelho testified about a litany of problems he had with Palmeri's work, which he claimed to have discussed with Kevin Caira regularly. Significantly, Kevin Caira did not cite any of these other issues as reasons for Palmeri's termination.

In rebuttal, the General Counsel called John Beauregard, the inspector who was at the site on November 11. According to Beauregard, he found three problems with the Respondent's work, including the one referred to in the written deficiency report given to the Respondent by the General Contractor. One of the deficiencies noted was failure to use the prefabricated 90-degree angle Dur-o-wall in a corner wall. This is the omission for which Palmeri admitted responsibility in his testimony. Beauregard testified that the problem was corrected within a half-hour and did not involve tearing down any walls. Beauregard testified further that he found, at two other locations at building A, involving different masons, that the Respondent was not overlapping the Dur-o-wall the required 6 inches and that these deficiencies were also corrected in his presence. Beauregard testified that when he returned to the site the next day, November 12, he found another mason also not overlapping the required 6 inches, again on building A. Beauregard testified that he did not make a written report of these deficiencies because they were corrected in his presence. It is undisputed that Palmeri was working on building B on November 11 and that he was fired before the start of work on November 12. Thus, Palmeri could not have been the mason responsible for

not overlapping, or splicing, the Dur-o-wall the 6 inches specified.[4]

The complaint alleges that Respondent's termination of Palmeri violated Section 8(a)(1) and (3) of the Act. In cases under Section 8(a)(1) and (3), which turn on employer motivation, the Board requires the General Counsel to make a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision to take adverse action. On such a showing, the burden shifts to the employer to establish that it would have taken the same action even in the absence of protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Supreme Court approved the Board's burden-shifting analysis in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The essential elements of General Counsel's prima facie case are protected activity, employer knowledge of that activity, antiunion animus and timing. Because there is seldom direct evidence of unlawful motivation, the Board has held that motivation may inferred from the totality of circumstances. *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). In order to meet its burden under *Wright Line*, supra, an employer must do more than merely proffer a legitimate reason for its action. Rather, the employer must show by a preponderance of the evidence that it would have taken the same action even in the absence of protected activity. *Monroe Mfg*., 323 NLRB 24 (1997); *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

The evidence establishes that Palmeri was a union member and that this was known to the Respondent from the time he was hired. On November 11, Respondent became aware, through the letter hand-delivered by Palmeri to Coelho, that Palmeri was going to actively organize its employees on behalf of the Union. Jack Caira confirmed this by asking Palmeri what the letter meant and by Palmeri telling him that it meant that he was going to organize the Respondent into the Union. Although Kevin Caira denied knowledge of this before Palmeri's termination, I have already found this denial to be incredible. Coelho admitted knowledge and Jack Caira did not dispute Palmeri's testimony regarding their conversations about the letter. Considering Kevin Caira's testimony that he was in constant contact with his foreman and brother regarding what was happening on the job, it defies logic to think that they didn't tell him about the letter on November 11. Coelho's testimony that he discussed Palmeri's request for a meeting with Jack Caira and that Jack told him that his brother Kevin was coming down the next day to talk to Palmeri further supports a finding that Kevin knew about Palmeri's status as a union organizer before terminating him.

The record also contains evidence of the Respondent's antiunion animus based on Jack Caira's unlawful threat to Palmeri the day before his termination. In addition, animus may be inferred from the timing of his discharge, almost immediately upon Respondent being informed of his intent to organize its employees on behalf of the Union, and the circumstances surrounding the discharge. Palmeri was terminated abruptly, midweek, without any discussion of the reasons for his termination. Moreover, even assuming that Palmeri had been a poor employee since he started, the Respondent apparently tolerated his work deficiencies until it received the letter from the Union. See, e.g., *Trader Horn of New Jersey,* 316 NLRB 194, 198 (1995); *Forestwood Farms, Inc.,* 308 NLRB 1049, 1054 (1992). There is also no evidence that Palmeri was advised, before November 12, that he was in danger of losing his job because of his job performance. In finding that the General Counsel made out a prima facie case of discrimination, I have also considered the inconsistent testimony of the Respondent's witnesses who testified regarding Palmeri's work performance and the lack of credibility of Kevin Caira's explanation for Palmeri's termination. The Board has historically considered such factors in determining whether a prima facie case has been established. See, e.g., *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988); *Abbey's Transportation Services*, supra; and *Bill Fox Chevrolet, Inc.,* 270 NLRB 568, 574 (1984).

Having found that the General Counsel established a prima facie case that Palmeri's discharge was motivated by his union membership and activities, I must determine whether the Respondent met its burden of proving that Palmeri would have been terminated for substandard performance even absent union activity. As noted above, Kevin Caira's testimony regarding his reason for terminating Palmeri is not credible. Even assuming that Palmeri was slow, prone to improperly installing Dur-o-wall and may have caused the wall to blow out on November 5 by using an improper block, the Respondent has not shown that it would have terminated Palmeri for these reasons had it not received the Union's November 10 letter identifying Palmeri as the principal union organizer on site. As noted above, there is no dispute that the Respondent reinstated Palmeri after he quit over the wall blowout despite its belief that he was responsible for it. Moreover, the testimony of Respondent's witnesses about Palmeri's poor productivity and deficiencies in workmanship are not credible in light of the testimony of Coelho and Kevin Caira that it only takes a day or two to determine if a new employee can do the job and if they cannot, the Respondent will terminate them. Palmeri worked for the Respondent for more than 2 weeks, despite his lack of skills and productivity as a bricklayer. Finally, the Respondent failed to show that any other employee had been terminated for similar reasons, despite the fact that other bricklayers admittedly had problems with the Dur-o-wall. Kevin Caira's testimony that he fired as many as 10 employees on the UConn job in November and December was contradicted by his two foreman on the job, Coelho and Quinlan. I also note that the Respondent offered no payroll records or other documents to corroborate Kevin Caira's claim, even after he testified that he would be able to identify the employees he fired if he were shown the payroll records. In summary, I find that the Respondent has not met its burden of rebutting the General Counsel's prima facie case.

[4] As noted above, Palmeri acknowledged needing "guidance" regarding the proper splice during his first 2 days on the job. Coelho also testified that it was common for new employees, who were not used to working with this material and were not familiar with the specifications, to fail to make the proper splice. Quinlan also acknowledged that this was a common problem. He testified further that no one had ever been fired for this.

Accordingly, I conclude that Palmeri's discharge violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

The complaint also alleges that the Respondent terminated Theodore Mayo on November 12 because of his union membership and activities. Mayo has been a member of the Union since 1992 but is not an officer. He testified that he had been working at the UConn job for another contractor and that, after being laid off for lack of work, he heard that the Respondent was hiring bricklayers for another building being constructed. According to Mayo, he went to the construction site on November 11 and asked to speak to the foreman, whom he identified as Cesar Coelho. He asked Coelho if he was hiring masons. Coelho asked Mayo if he was in the Union. Mayo replied affirmatively. Coelho then asked Mayo if he wanted to start that day or the next. Mayo said he wanted to start that day, he got his tools from the truck and began working. Coelho did not directly contradict Mayo's testimony regarding his hiring, but he did deny generally asking any employees whether they were union members.

The General Counsel alleges that Coelho's questioning of Mayo about his union membership when he applied for a job violated Section 8(a)(1) of the Act. As noted above, Coelho did not specifically deny questioning Mayo regarding his union membership when he applied for work. This questioning was consistent with Caira's questioning of other applicants, including Palmeri. Accordingly, I credit Mayo's testimony and find that Coelho interrogated him regarding his union membership. As for the General Counsel points out, this questioning is unlawful even absent other coercive conduct and despite the fact that Mayo was subsequently offered employment. *Rochester Cadet Cleaners, Inc*., 205 NLRB 773 (1973). I find that the Respondent violated Section 8(a)(1) of the Act as alleged with respect to this incident.

There is no dispute that Mayo was assigned to work with Palmeri the first day.[5] Mayo testified that he worked the rest of that day with no problems and no complaints from the Respondent's foreman. Mayo testified further that on his second day November 12, as he was arriving for work, Jack Caira approached him and asked Mayo what Tim Palmeri's problem was. Mayo responded that he didn't know. In response to leading questions used to refresh his recollection, Mayo recalled that Jack Caira also asked Mayo if Tim was trying to organize and said "something about the Union." Mayo told Jack that he didn't know. Upon further leading, Mayo recalled being asked by Jack if he was in the Union. Mayo said that he was. According to Mayo, at that point, Jack saw his brother Kevin walking through the building and said to Mayo, "Let's go talk to my brother." After Jack introduced Mayo to Kevin Caira, Kevin asked Mayo, "what's Tim's problem?" Again, Mayo said he didn't know. At that point, according to Mayo, Kevin Caira said that he didn't "want anybody talking union at work or in the shop or wherever or they are going to get fired." Then, Kevin asked Mayo if he was in the Union. Mayo did not testify as to his response. The conversation then ended and Jack Caira and Mayo walked back to the building to start work. According to Mayo, Jack told him as they were walking that he was going to sue Palmeri for being a union representative on his job. Mayo testified that he knew at the time of these conversations with the Caira brothers that Palmeri had been fired. Neither Jack nor Kevin Caira testified about these conversations. The General Counsel alleges that Jack and Kevin Caira committed unfair labor practices in violation of Section 8(a)(1) of the Act during these conversations. These allegations will be discussed in conjunction with the discussion of Mayo's termination.

According to Mayo, about 2 hours after this conversation, Jack Caira approached him while he was working and told him that he was not putting out enough work, that his work was poor and that he had to let him go. Jack Caira then said, "You must have been an apprentice when you were in the Union." Mayo pointed to another bricklayer who was doing the same work that Mayo was doing and said, "my leads up before his," referring to the opposite corners of the wall they were each working on. Jack Caira did not respond to this, but repeated that he had to let Mayo go. Jack Caira then took down Mayo's name and address so the Respondent could send him his paycheck.[6] Mayo picked up his tools and left the job. Mayo testified that he had no prior warning that his work was not satisfactory or that his job was in jeopardy.

Jack Caira testified that Mayo quit and was not terminated. According to Jack Caira, he had observed Mayo lay 8 or 9 blocks in a 1-1/2-hour period on building A and he told Mayo that he needed to pick it up, that he was not doing what was expected on the job and not keeping up with the other masons. Mayo reacted to this "pushing" by saying that he didn't need this, he quit. Jack Caira testified that he called after Mayo as he was leaving and told him that he had to give him his name and other information if he wanted to get paid. Mayo came back and gave him the information, then left. When confronted with a statement in a letter from Respondent's counsel to counsel for the General Counsel, dated April 23, 1998, indicating that Mayo was fired after repeated warnings about the quality and production of his work, Jack Caira testified that this statement was inaccurate. Jack Caira pointed out that the letter said that Mayo worked for the Respondent for about a week when, in fact, he only worked 10 hours. Jack Caira denied that the attorney spoke to him before writing the letter.[7]

Coelho testified that Mayo was caught by the State inspectors leaving Dur-o-wall out on the same day as Palmeri. This testimony was corroborated by Quinlan, who I found to be a credible witness. According to Quinlan, Coelho sent Mayo to work for him on building A on his second day of employment. Quinlan testified that Mayo was slow. He further testified that when someone from Suffolk Construction, the General Con-

[5] Palmeri testified that he saw Coelho talking to Mayo on November 11 and recommended that Coelho hire Mayo.

[6] There is no dispute that Mayo had not filled out a W-4 or any other paperwork when he was hired by Coelho.

[7] I received this letter in evidence over the Respondent's objection, but reserved ruling on the weight to attach to the statements contained therein. Having considered the matter further, I find that the letter was a response to the General Counsel's settlement proposal and not an admission against interest. Under the Federal Rules of Evidence, statements made in negotiations to compromise a claim are not admissible to prove liability for or invalidity of a claim (FRE 408).

tractor, brought to Quinlan's attention that Mayo was missing the Dur-o-wall, he told Mayo that he had to put the Dur-o-wall in every two courses. Mayo said fine, but an hour later Mayo missed the Dur-o-wall again. This time, Quinlan told Mayo, "this can't go on like this." As noted above, Quinlan conceded this was a common problem and that no one had been terminated for missing wire, i.e., Dur-o-wall, before. Quinlan did not terminate Mayo.

Coelho also testified that Mayo was slow and that he sent Jack Caira to talk to Mayo about his production. This would be consistent with Jack Caira's responsibilities as the "pusher" to get the work out. Coelho also denied terminating Mayo. According to Coelho, after he sent Jack to talk to Mayo, he saw Mayo walking off the job with a bag in his hands, presumably his tools.

Kevin Caira testified that he received his first-ever "deficiency report" from the general contractor regarding Mayo. He identified a Suffolk Construction document labeled "Avoid Verbal Orders" and referring to an incident on building A as the "deficiency report" related to Mayo's work. This report indicates that the architect's field representative and the Suffolk superintendent found CMU walls being installed without Dur-o-wall and directs the Respondent to remove the block and install the wall according to plans and specifications, with the Respondent bearing any additional costs associated with this work. As noted above, Kevin Caira claimed to have received this report and the one described above relating to Palmeri at the same time, i.e., several days after the incidents when he met with Suffolk's superintendent on the job. As with the other "deficiency report," the date appears to have been altered, from "4 November" to "11 November." As with the other document, Kevin Caira testified this is the way it was presented to him and he did not alter the dates. Kevin Caira could not recall the exact date he received the report other than that it was in November.

Kevin Caira testified that, in response to receiving a verbal report of the substance of the written "deficiency report," he asked his foreman who was working on that wall. When he was informed that it was Mayo, he told the foreman if it happens again, fire him. Kevin Caira did not identify which foreman he spoke to. As noted above, the Respondent denies that it fired Mayo, asserting that he quit voluntarily.

The General Counsel's allegations regarding Mayo, other than the interrogation found above, are premised on his working for the Respondent on November 11 and 12. The Respondent's certified payroll records show that he actually worked on November 3 and 4. The handwritten timesheets for the week ending November 8 were certified by Kevin Caira on November 8 and the computer payroll report for this week was run on November 13. Mayo's name does not appear in any later payroll report. It is unlikely that the Respondent would have the forethought to alter Mayo's dates of employment before a charge was even filed. I find that the payroll records are conclusive proof that Mayo was employed on November 3 and 4, a full week before the Respondent received the Union's letter announcing it's organizing drive. I further find that the November 4 date is consistent with the original date on the first deficiency report, and consistent with the credible testimony of Quinlan regarding what the inspector and Suffolk's superintendent pointed out to him on Mayo's second day on the job, which was the only day that he worked on building A. Although Beauregard, the architect's inspector, testified that he was only on site November 7, 10, 11, and 12 and that he found the problems with the Dur-o-wall on November 11 and 12, he acknowledged that someone else performed site inspections before him. I also note that the problems that Beauregard identified related to the splice or overlap of the Dur-o-wall, not leaving it out altogether. The "November 4" deficiency report states that the Dur-o-wall was not being installed at all, which is consistent with Quinlan's testimony.

It is difficult to discredit Mayo's testimony regarding the conversations he alleged having with the Caira brothers on November 12 because neither one contradicted Mayo's testimony. Nevertheless, because Mayo was not working for the Respondent on November 12, these conversations could not have occurred as Mayo described them. There would be no reason for Jack or Kevin to ask Mayo what Palmeri's problem was, or whether Palmeri was trying to organize on behalf of the Union before November 11, the date they received the November 10 letter from the Union. The General Counsel offered no evidence that any organizational activity occurred that was known to the Respondent before receipt of this letter. In fact, the General Counsel concedes that Mayo was not engaged in any organizational activity before this conversation. It is also improbable that Kevin Caira would have threatened to fire anyone talking about the Union, or that Jack Caira would have threatened to sue Palmeri for being a union representative on the job before they were aware of Palmeri's role with the Union and it's organizational intent. Finally, Mayo's testimony that he knew that Palmeri had been terminated at the time of this conversation shows that the testimony is false. Mayo was not even working for the Respondent when Palmeri was terminated. Accordingly, I shall recommend dismissal of the allegations that Jack Caira interrogated Mayo on November 12 and that Kevin Caira threatened him with job loss on the same date.

With respect to Mayo's allegedly discriminatory termination, the General Counsel has the burden of proving, under *Wright Line*, supra, a prima facie case that the Respondent took adverse action against Mayo because of his union membership or activities. Although Mayo was a union member when employed by the Respondent and knowledge of his membership is established through Coelho's unlawful interrogation regarding his union membership at the time he was hired, the General Counsel has not proved that Mayo engaged in any protected activity during his brief employment by the Respondent. Had Respondent wanted to discriminate against Mayo solely because he was a union member, they would not have hired him in the first place. Thus, the General Counsel has not met the prima facie burden of establishing a discriminatory motive even if Mayo was terminated on November 4, rather than quitting. The essential elements of timing and animus with respect to Mayo's union membership are missing in this case. Accordingly, I shall recommend dismissal of this allegation as well.[8]

[8] Although not necessary to the determination above, I credit Jack Caira's testimony that Mayo quit in response to his pushing him to put out more work. Caira was corroborated in many respects by Quinlan

Finally, the complaint alleges that the Respondent interrogated two job applicants, Todd Dexter and Judith Livesey, and refused to hire them on November 18 because of their union membership. Dexter, a union member, testified that he was referred to the Respondent's jobsite by Palmeri. Dexter met Palmeri and Livesey in the parking lot outside the jobsite at approximately 6:30 a.m. on November 18. Palmeri told Dexter that Jack Caira was the person to talk to about a job. Dexter and Livesey approached a group of masons as they arrived in a commuter van and asked where to find Jack Caira. Following their directions, he walked onto the site with Livesey in search of Jack Caira. When they found Jack Caira, Dexter asked him if he was hiring bricklayers. Jack asked if Dexter was union. He replied that he was. Jack then said he had "just got rid of your union buddies for poor performance." Livesey was present and Jack asked her if she was in the Union. Livesey nodded affirmatively. Jack told Dexter that he needed 200 blocks a day. After some discussion whether that was feasible, Jack said he could accept 180. Dexter then asked about the hours of work, i.e., starttimes, breaktime, and lunchtime and ending time. Jack said they would be starting at 7:30 a.m. and working until 4:30 p.m. that day because they were starting late due to the cold. Dexter then told Jack he needed to find a phone to call his wife to arrange for someone else to pick up his daughter at daycare and the three of them headed to the trailer. On the way, they encountered a man whom Jack Caira introduced as the superintendent for Suffolk. This individual said, "glad to have you on board" and Jack responded, "I've got my girl," referring to Livesey. Dexter testified further that after he called his wife he and Livesey went back to the parking lot to wait for the 7:30 a.m. start. Shortly before 7:30 a.m., Dexter started to go to the worksite to check out the work. Livesey was not with him this time. Jack Caira came out of the trailer and stopped him, telling Dexter, "Sorry, I can't put you on. I just got off the phone with my boss and he's been getting a lot of letters and stuff and with you being Union, I can't put you on." Dexter testified that on the way out he encountered Livesey who reported a similar conversation with Jack Caira. According to Dexter, he and Livesey then went home.

Livesey's testimony was essentially the same as that of Dexter, with only minor variations in the details, regarding the initial conversation with Jack Caira and the encounter with the superintendent. Livesey entered the worksite separately from Dexter when it was time to start work at 7:30 a.m. According to Livesey, Jack Caira stopped her and said he wouldn't be able to hire her, that it wouldn't be worth it, that he had talked to his brother, and that it just wouldn't be worth it. Livesey thanked him and asked for directions to the ladies room. She met up with Dexter and they both left. Dexter and Livesey denied that they were told to contact the office if they wanted to work. Both admitted that it was very cold that day and that they didn't see any of the bricklayers working before they left the site.

Jack Caira testified that he recalled being approached by two people looking for work, but he did not recognize Dexter or Livesey as these two people. He recalled telling the two applicants that he thought the office was hiring, but he was not sure and would have to talk to his brother. He denied asking them or being aware that the two were union members. He told them he was busy at the moment and asked for 10 minutes to go over the machines and make sure the laborers were set up to start work. According to Jack Caira, one of the two people started asking a lot of questions about starting times, breaks, etc., and that he answered all these questions. At that point, this individual said he needed to make a phone call and Jack told them he did too and he went to call his brother. Jack Caira further testified that he called his brother and asked about hiring the two people. Kevin Caira shouted at Jack, "Are you crazy, it's 15º outside, they're going to pour the floor shortly, how can you put people on, there's not enough work for our people." After this conversation, Jack said he was disgusted with the way his brother treated him and was ready to quit himself. As he walked out of the trailer, mumbling to himself that it's not worth the aggravation, he saw the two people who were looking for work. Jack Caira testified that he told them that he was sorry, that the office wasn't hiring right now. The certified payroll records in evidence show, and Jack Caira confirmed, that the Respondent's bricklayers did work on November 18, even though it was cold and they got a late start.

Kevin Caira corroborated his brother regarding the telephone call. Jack and Kevin Caira also testified that the Respondent did not need any employees at the time. According to the Respondent's witnesses, the general contractor was getting ready to pour the floor and the Respondent would have to wait 10 days while the floor set before it could resume work. Kevin Caira also testified that he had bricklayers working on other jobs in the Boston area that he could use if he needed anyone. Kevin Caira further testified that in early November he had hired several bricklayers from Canada, led by Craig Jacques, who were supposed to start on the UConn job the week after they were hired. According to Kevin Caira, they were delayed and did not show up until the week before Thanksgiving.

There is no dispute that the Respondent was running advertisements for bricklayers in local newspapers and in newspapers as far away as Montreal, despite this lack of need for employees. Moreover, the certified payroll records in evidence show that Jacques, another bricklayer, and a laborer from Canada first appear on the UConn payroll on November 24. These records also show that two other bricklayers, Louis Mayo and Bromwell O. Hill Sr., who were Connecticut residents, started working at the UConn job on November 19 and 24, respectively. The Respondent offered no explanation whether these were new hires, when they were hired, or why Dexter and Livesey were not considered for these openings.

I credit the mutually corroborative testimony of Dexter and Livesey that Jack Caira asked them if they were in the Union and told them, in the same conversation, that the Respondent had just fired or "got rid of" other union members for poor performance. I also credit Dexter's testimony that when Jack Caira told him, after calling the office, that he couldn't hire him, he referred to the problems that the Respondent was having with the Union. In this context, Jack Caira's questioning of Dexter and Livesey regarding their union membership was

and Coelho. Mayo's conduct in walking off the job is consistent with that of Palmeri the following day, November 5, when he walked out in response to a similar confrontation with Jack Caira.

coercive and violated Section 8(a)(1) of the Act. *Adco Electric,* 307 NLRB 1113, 1116 (1992); *Rochester Cadet Cleaners,* supra.

The Board applies the same *Wright Line* test to determine whether a refusal to hire an applicant violates Section 8(a)(1) and (3). *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). In addition to the other elements of the General Counsel's prima facie case, the availability of jobs for the applicants must be shown. *Bay Electric,* 323 NLRB 200 (1997); *WestPac Electric,* 321 NLRB 1322, 1346 (1996). In the instant case, the General Counsel has shown that Respondent was aware of the union membership of Dexter and Livesey through the credited evidence of interrogation by Jack Caira. Respondent's antiunion animus is established on this record by the unlawful threat to and the discriminatory discharge of Palmeri, as well as the unlawful interrogation of Dexter and Livesey when they applied. Moreover, Jack Caira's reference to the termination of other union members in the same conversation is further evidence of antiunion animus. Finally, Caira's statement to Dexter, linking the refusal to hire him to the letters and stuff that the Respondent was getting about the Union, is direct evidence of a discriminatory motivation.

I further find that the General Counsel has established that jobs were available for Dexter and Livesey when they applied. As noted above, Louis Mayo started working the next day and Bromwell O. Hill the following Monday. Thus, even were I to believe Kevin Caira's testimony regarding the hiring of the Canadians, there were apparently other openings available at the time Dexter and Livesey applied. I do not credit the testimony of Jack and Kevin Caira regarding the status of the job and the allegedly ensuing downtime related to pouring of the floor. The Respondent offered no evidence to support this assertion and the limited payroll records in evidence do not show a reduction in the number of bricklayers onsite in the 2 weeks following the refusal to hire Dexter and Livesey. On the contrary, the Respondent added the three Canadians and Louis Mayo and Hill. Having discredited the Respondent's proffered justification for not hiring Dexter and Livesey, I find that the Respondent has not met it's burden, under *Wright Line*, supra, of showing that it would not have hired them even absent their union membership. Accordingly, I conclude that the Respondent violated the Act as alleged in the complaint with respect to Dexter and Livesey.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their union membership and by threatening employees with job loss for engaging in union or protected activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating its employee Timothy Palmeri on November 12, 1997, because of his membership in and activities on behalf of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By refusing to hire Todd Dexter and Judith Livesey on November 18, 1997, because of their membership in the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. The Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Palmeri, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To remedy the discriminatory refusal to hire employees, the Respondent must offer employment to Dexter and Livesey and if there are openings currently available on the UConn jobsite or, to substantially equivalent positions if those jobs no longer exist, and make them whole for any loss of earnings and other benefits, in the manner described above, from the date each would have been employed but for the Respondent's unlawful refusal to hire them until the date of a proper offer of reinstatement. See *B E & K Construction Co.,* 321 NLRB 561, 562 (1996); *Dean General Contractors*, 285 NLRB 573 (1987).

The Acting General Counsel has requested, in brief, that the Board amend the standard provision in its backpay orders that requires a respondent to "make available" to Board agents those records necessary for computing the amount of backpay due. The Acting General Counsel seeks an order requiring the Respondent to physically produce copies of such records at the Board's Regional Office, including electronic copies of payroll records if such records are already maintained in such form. Although the Acting General Counsel makes a persuasive argument for such a change in the Board's traditional practices, it does not offer any empirical evidence to support its claim that the existing procedure has become cumbersome or unworkable, or otherwise adversely impacted the rights of employees. Nor has the Acting General Counsel cited any specific need for such a provision in the instant case. Accordingly, I shall leave for the Board to determine whether a modification of this provision in a backpay order is appropriate for this and future cases.

[Recommended Order omitted from publication.]